SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ~~940~~ 939

THE FERBER COMPANY *et al.*,
PETITIONERS,

v.

THEODORE J. ONDRICK *et al.*,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, The Ferber Company and A. Kaplen & Son Ltd. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled case on November 28, 1962.

Citations to Opinions Below

The Opinions of the District Court (Sweeney, J.) are not reported but are found at pages 200 et seq. of the Record Appendix. The opinion of the Court of Appeals is reported at 310 F.2d 462.

Jurisdiction

The judgment of the Court of Appeals was entered on November 28, 1962. A petition for rehearing filed on December 12, 1962 was denied on December 21, 1962. The jurisdiction of the Court is invoked under 28 U.S.C. §1254.

Questions Presented

Parties to this controversy included as part of their contract the following arbitration rider:

> "Any controversy or claim arising out of or relating to this Contract or the breach thereof shall be determined by arbitration in accordance with the Rules of the American Arbitration Association, New York, N.Y. (as obtaining upon the date of giving notice of intention to arbitrate) and judgment upon the award rendered in accordance therewith may be entered in any Court having jurisdiction thereof. In the event that arbitration is resorted to by either party, the hearings shall be held in the City of Hackensack, County of Bergen, State of New Jersey." (R. 171)

The questions presented are:

1. Whether duly raising the issue of lack of jurisdiction by a court of law prior to arbitration prevented the District Court from ruling on the merits of the counter-claim?

2. Whether a contract, otherwise protected by arbitration, loses its rights as a condition precedent to any litigation, if Rule 22 of Federal Rules of Civil Procedure is invoked?

3. Whether Rule 22 enlarged the federal court's jurisdiction to include counterclaims that are not the subject of interpleader?

4. Whether Rule 22 enlarged the federal court's jurisdiction to broaden the scope of the subject matter of interpleader to include issues over and above the money deposited in the Registry of the Court?

5. Whether the filing of a Bill of Interpleader under 28 U.S.C. #1335 or Rule 22 can act as a waiver of arbitration clause?

Statutory Provision Involved

The statutory provision involved is Rule 22 of Federal Rules of Civil Procedure—Interpleader which is printed in Appendix B, *infra* p. 13.

Statement of the Case

Petitioners were prime contractors under a contract with the United States Air Force to construct 310 Family Units at Westover Air Force Base in Chicopee, Massachusetts.

In August 1958, petitioners entered into a sub-contract with respondent Theodore J. Ondrick as part of a joint venture to do certain clearing, excavation, filling and drainage items in connection with the prime contract. The sub-contract had a provision for arbitration to cover disputes. A dispute arose as to the placing and compacting of gravel and respondent instead of taking the matter to arbitration slowed down on the project. The petitioners called in the bonding company after which the respondent finished the job. Prior to completion of the contract, Wilbraham Construction Corp. the other part of the respondent's joint venture went into bankruptcy. After the work had been completed the respondent Ondrick claimed as an individual the sum of $19,744.42 as extras for the disputed work above the original contract price.

Due to many liens and claims filed against the respondent subcontractors, the petitioners filed a statutory interpleader (28 U.S.C. #1335) in the Massachusetts District Court depositing in the Registry of that Court the sum of $46,507.83, the final payment due on sub-contract.

In the pleadings setting forth the Bill of Interpleader, the petitioners stated that the respondent Ondrick had made demands over and above the contract price. Respondent Ondrick filed an answer in which he admitted making such claims "not as part of the joint venture", and by counterclaims demanded payment.

The petitioners filed a motion to dismiss counterclaim raising several affirmative defenses including the issue of failure to arbitrate, which motion was denied. By answer to counterclaim, petitioners once more raised the issue of arbitration being a condition precedent to trial of the merits, by a court of law.

Following trial without jury, the District Court in preliminary interpleader proceedings found for respondent Ondrick in the amount of $7,120.80, which it subsequently increased to $10,711.20, then granted interpleader for $46,507.83.

Both the District Court and the Court of Appeals, each by a different interpretation have adopted a construction of waiver inferred by the petitioners' Bill of Interpleader which is erroneous in that Courts at no time had jurisdiction over the merits of the respondent's counterclaim.

Although many other issues were involved, petitioners desire to confine the issue only to those paragraphs of the opinions dealing with the question of arbitration. The District Court stated: "the plaintiffs alternatively defend against this claim on the ground that Ondrick failed to exhaust his remedies in that he did not apply for arbitration of the dispute as provided in the agreement. However arbitration was available to both parties; and the plain-

tiffs, at no time, sought to avail themselves of the right to arbitration. I find that the plaintiffs waived their right by their election to try the issue and defend against the counterclaim in this court.

On appeal, the Court of Appeals found a waiver by adopting a wrongful conclusion of petitioners' pleading stating: "The first question is the correctness of the court's refusal to dismiss the counterclaim on the ground that the parties had provided in the subcontract for arbitration. Assuming that Ondrick's claim fell within the contract as extra work and was therefore arbitrable, we nevertheless think it clear that Ferber waived this right. Ferber could have brought a bill of strict interpleader solely with relation to the undisputed amount. But having elected, in addition, to raise a disputed claim, see F. R. Civ. P. Rule 22, *Standard Surety & Casualty Co.* v. *Baker*, 8 Cir., 1939, 105 F.2d 578, it must take the consequences. It could not ask the court to declare that it owed only so much to Ondrick, and that the court should discharge it from his claim for extra work, and then, when Ondrick resisted such a declaration, demand that Ondrick arbitrate."

Reasons for Granting the Writ

The decision below should be reviewed because it erroneously interprets Rule 22 of the Federal Rules of Civil Procedure by extending its jurisdiction to matters for which original jurisdiction is lacking. In addition, the court below broadened the scope of Rule 22 to issues lacking interpleader intent and not specifically contained in said rule. Furthermore this court has previously granted certiorari in *Robert Lawrence Company, Inc.* v. *Devonshire Fabrics, Inc.*, 362 U.S. 909 which involved controversial issues similar to the case at bar, but was dismissed pursuant to Rule 60 and would have cleared up unsolved issues of

Bernhardt v. Polygraphic Company of America, (1956) 350 U.S. 198, especially in the area of arbitration, where federal and state laws clash. In the case at bar, Rule 22 a federal law invalidates an arbitration contract governed by local law. It involves the interpretation of non-statutory actions in interpleader which has not been settled by this Court.

1. It is well settled that the subject matter of an interpleader action is the money deposited in the Registry of the Court." The decision of the court below appears to have changed the applicable law, and seems to be based on the premise that Rule 22 extended the jurisdiction of the court to rule on matters other than interpleader. This interpretation has not been settled by this Court. In holding that under Rule 22 the petitioners waived arbitration as a condition precedent, the Court below arbitrarily deprived the petitioners of their contractual rights, and revived the respondent's claim which he had lost by refusing to arbitrate. The courts have repeatedly held that all doubts should be resolved in favor of both arbitration and interpleader. Furthermore the Court of Appeals has adopted a rather novel approach in resolving petitioners' Bill of Interpleader as having made out a case against themselves. It is, of course rudimentary that the subject of interpleader is the money involved and is a condition precedent to obtaining interpleader jurisdiction. The law is well settled that where claims for a sum of money only are involved, payment of the entire sum is necessary to give the Court jurisdiction. Hence, the Court had jurisdiction only of the money deposited in the Registry or $46,507.83. The Court at no time had jurisdiction over the counterclaim as no money on this count had been paid into the Registry of the Court. There is nothing in the Petitioners' bill that could be construed to include that relief was sought from the counterclaim, nor is it even possible under Rule 22 to

ask for such relief. Such findings are in defiance of the due processes of law and affords petitioners no equal protection, since no opportunity was afforded petitioners to prepare a defense or to seek a jury trial if they so desired.

Pleadings in the Bill of Interpleader should not be resolved against the petitioners. Under interpleader statutes, whenever counterclaims are sought, the District Court holds hearings under phase one to determine if interpleader should be granted. In this case, the Court allowed interpleader after first determining the amount due on the counterclaim. Such departure of procedure, deprived the petitioners from demanding a jury trial. There is no legal justification to the finding that petitioners' Bill of Interpleader created a waiver of the right to demand arbitration and the manner in which both the District Court and the Court of Appeals arrived at this decision is a departure from both the usual procedure and law. It is respectfully submitted that this Court should exercise its inherent power of supervision over the administration of the Federal District Courts and decide whether such Courts can arbitrarily decide that arbitration as a condition precedent to bringing a claim is waived by the bringing of a Bill of Interpleader.

2. Furthermore, and aside from its novelty, the question presented is of importance in the administration of the law of both arbitration and interpleader. The courts below hold that arbitration is waived by the Bill of Interpleader, and a complete departure from the present laws.

If the decision of the Court below is permitted to stand, it will impose upon interpleaders burdens not intended by Rule 22. Settlement of the question by this Court is plainly in the public interest since it involves the rights of interpleaders and burdens them with the loss of contractual rights. It is a departure from the theory once stated by Judge Holmes who said in a Massachusetts case "The

remedy by interpleader is so beneficial that we are disposed to resolve any doubts in favor of the plaintiff."

3. The decision of the Court below involves a direct conflict with the decisions of the Court of Appeals in the second, fourth and sixth circuits.

In *United States* v. *Al-Con Development Corporation*, 271 F.2d 904 (4th Cir. 1959) it was held that where contract provided for arbitration of disputes, arbitration was a condition precedent. *American Airlines, Inc.* v. *Louisville & Jefferson County Air Board*, 269 F.2d 811 (6th Cir. 1959) which stated: "Thus the congressional purpose was to make arbitration agreements within the scope of the Federal statute as effective enforceable as any other contract, and so permitting contracting parties thereby to avoid, if they care so to do, the delay and expense of litigation." *Robert Lawrence Company, Inc.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2nd Cir. 1959) which also held arbitration as a condition precedent, in a contract that defendant claimed an affirmative defense of fraud.

The decision of the Court below conflicts with the principle that arbitration is a condition precedent to the bringing of an action where parties have made arbitration as part of their contract. The English Courts have held that impleader will not be allowed where a contract requires arbitration of disputes. They have held that a person who has entered into a contract containing an arbitration clause should as a general rule be made to keep his contract. It is a general principle that people who make contracts should keep them rather than break them. *Jones* v. *Birch Bros. Ltd.*, (1933) 2 KB 597 (CA), *Gowar* v. *Hales*, (1928) 1 KB 191 (CA).

Both the District Court and the Court of Appeals took jurisdiction over the counterclaim by a waiver of the arbitration agreement which is in conflict with the case of *United States et al.* v. *Corrick et al.*, 298 U.S. 435, 440 where

this Court stated: "While the District Court lacked jurisdiction, we have jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit." Since the lower court and the Court of Appeals took jurisdiction by waiver of the arbitration agreement which conflicts with the principle that it is a condition precedent, thus giving rise to the necessity of the settlement by this Court of the disputed question.

4. Finally, the Court below approved the procedure of the District Court in obtaining jurisdiction over the counterclaim by waiver, by interjecting Rule 22 of the Federal Rules of Civil Procedure. This appears to be in conflict with the decision in *Kern* v. *Standard Oil Co.*, 228 F.2d 699 (8th Cir. 1956) which holds that "Lack of jurisdiction of a federal court cannot be waived."

Rule 22 neither creates substantive rights nor enlarges the jurisdiction of the federal courts, but merely prescribes a procedure to be followed where federal jurisdiction requirements are already present. The purpose of the rule was to set up procedures doing away with differences between bills in interpleader and bills in the nature of interpleader, and also for the bringing of counterclaim and cross claim for interpleader. Respondent Ondrick's counterclaim was not under Rule 22, as he was not seeking interpleader, but attempting to be paid for a claim over and above the amount of money deposited under a statutory interpleader in the Registry of the Court. The lower courts' findings are not consistent with independent liability procedure. A defendant who has a claim of law against the plaintiff in interpleader is entitled to a jury trial and his claim may not be disposed of by the Court in preliminary interpleader proceedings. *Odun* v. *Penn Mutual Life Insurance Co.*, 288 F.2d 744 (5th Cir. 1960). The Court of Appeals having ruled that petitioners had waived

their right to resist arbitration as a condition precedent under Rule 22, never afforded an opportunity to amend or to claim a jury trial as permitted under the rules. This places the petitioners in the unique and unenviable position of having made out a case against themselves.

Rule 22 does not extend powers on non-statutory interpleader actions. Statutory interpleader should be distinguished from non-statutory interpleader, which is governed by rule 22 (1) and different principles as to jurisdiction, venue and process. Had the petitioners desired to dispute the amount of respondent Ondrick's claim, they would have deposited the amount of the disputed claim in the Registry of the Court. Instead, they resisted the claim by a proper motion and later by answer. In *Standard Surety & Casualty Co.* v. *Baker*, 105 F.2d 578, (8th Cir. 1939) the plaintiffs deposited the disputed amount into court. Apparently, this has confused the Court of Appeals in making its decision in the case at bar. In addition Rule 82 of the Federal Rules of Civil Procedure does not permit a claim for which federal jurisdiction is lacking to be joined with one of which the federal court has cognizance.

The opinion of the Court of Appeals has implications which extends its reach beyond that intended by Rule 22. For this reason, this Court should determine whether the considerations which prompted the Court of Appeals to interject Rule 22 are proper to support its finding.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6015.

THE FERBER COMPANY ET AL.,
PLAINTIFFS, APPELLANTS,
v.
THEODORE J. ONDRICK ET AL.,
DEFENDANTS, APPELLEES.

OPINION OF THE COURT.

November 28, 1962.

ALDRICH, *Circuit Judge.* Ferber, short for two New Jersey corporations, joint venturers, was the prime contractor engaged in the construction of a housing project for a government Air Force base in Chicopee, Massachusetts. In August, 1958 Ferber entered into a subcontract with two other joint venturers, Ondrick, a citizen of Massachusetts, and Wilbraham Construction Corporation, a Massachusetts corporation, to do certain clearing, excavation, filling and drainage. It appeared that Ondrick and Wilbraham were equipped to do different parts of this work and desired separate contracts, but Ferber required a single agreement. After the work had been completed and $46,508 of the contract price remained to be paid, Wilbraham went into bankruptcy. Ferber thereupon filed a statutory interpleader (28 U.S.C. § 1335) in the Massachusetts district court against Ondrick, Wilbraham and their joint surety, and Wilbraham's trustee in bankruptcy, naming also all alleged suppliers of labor and materials

on their contract as to whom it had notice of claim. The complaint further alleged that Ondrick claimed as an individual, over and above the contract amount, $19,744 for labor, materials and the use of equipment.[1] Ferber paid the sum of $46,508 into court, alleged that this was the total amount due to all defendants, and prayed that the defendants be required to interplead and settle their rights between themselves and that Ferber "be discharged from all liabilities in the premises. . . ." Ondrick filed an answer in which he admitted making a claim for $19,744 "not as part of the joint venture," and by counterclaim demanded its payment. Ferber filed a motion to dismiss the counterclaim, which motion was denied. Following trial without jury the court found for Ondrick on his claim in the amount of $7,121, which it subsequently increased to $10,711. The court refused Ferber's request for an allowance for counsel fees out of the fund, a so-called interpleader fee. Ferber appeals.

The first question is the correctness of the court's refusal to dismiss the counterclaim on the ground that the parties had provided in the subcontract for arbitration. Assuming that Ondrick's claim fell within the contract as extra work and was therefore arbitrable, we nevertheless think it clear that Ferber waived this right. Ferber could have brought a bill of strict interpleader solely with relation to the undisputed amount. But having elected, in addition, to raise a disputed claim, see F. R. Civ. P. Rule 22; *Standard Surety & Casualty Co.* v. *Baker*, 8 Cir., 1939, 105 F.2d 578, it must take the consequences. It could not ask the court to declare that it owed only so much to Ondrick, and that the court should discharge it from his claim

[1] Hereafter we shall disregard Wilbraham, because even if this work was done pursuant to a modification of, and hence as part of, the joint contract, admittedly it was done by Ondrick alone. Wilbraham has in no way participated in this appeal.

for extra work, and then, when Ondrick resisted such a declaration, demand that Ondrick arbitrate.

• • •

Judgment will be entered vacating the judgment of the District Court and remanding the action for further proceedings in accordance with this opinion. No costs for either party.

Appendix B

Rule 22—Interpleader

(1) Persons having claims against the plaintiff may be joined, as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter claim.

The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C. ¤1335, 1397, and 2361. Actions under these provisions shall be conducted in accordance with these rules.

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT THEODORE J. ONDRICK'S BRIEF IN OPPOSITION

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RULE CITED

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT THEODORE J. ONDRICK'S BRIEF IN OPPOSITION

The Proceedings Below

This is a bill of interpleader brought in the United States District Court for the District of Massachusetts by the petitioners, who are joint venturers, hereinafter collectively called Ferber. Ferber deposited $46,507.83 into the court registry, alleging that such was a final payment due on a written contract between it on the one hand, and Respondents Theodore J. Ondrick and Wilbraham Construction Corp., who were joint venturers, hereinafter collectively

called Wilbraham (R. 7, 8.) on the other.[1] Ferber also alleged that the respondent Theodore J. Ondrick, hereinafter called Ondrick, had made a personal claim against the petitioners for $19,744.42 on account of certain work performed (R. 10). The petitioners then prayed for a discharge "*from all liabilities in the premises. . .*" (R. 12.)

Ondrick, in so much of his answer which is here now material, admitted that he had so made a claim of $19,744.42, alleging that such work was not performed pursuant to the joint venture contract between Ferber and Wilbraham (R. 17.) Ondrick, also, filed a counterclaim against Ferber, of which only Count I remains relevant. In it, Ondrick alleged that Ferber requested him to perform certain construction work; that he performed such work; that such work was outside the scope of the joint venture contract referred to in Ferber's bill and was extra work performed by Ondrick as an individual at the request of Ferber; that Ferber had not paid Ondrick for such work; and that Ferber owed him $19,744.42 for such. (R. 18, 19.) Ferber filed a motion to dismiss this counterclaim. It was denied. (R. 20, 21.)

In its answer to Ondrick's counterclaim, Ferber alleged as an affirmative defense Ondrick's failure to arbitrate in accordance with the terms of the said joint venture contract. (R. 23, 24.)

Ondrick's counterclaim was tried in the district court below. He was awarded judgment in the amount of $10,711.20. (R. 204.) On appeal below, the award was set aside on grounds not material here. The district court's denial of Ferber's motion to dismiss Ondrick's counterclaim, however, was affirmed.

Ferber now seeks a review of this determination.

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[1] Respondent Peerless Insurance Company has been a party through the proceedings below, but it is doubtful that it is a party here or has an interest in the present petition.

Facts

Ferber was the prime contractor on a government contract. (R. 26, 27.) Wilbraham was a subcontractor under Ferber. (R. 29, 30, 170.) The contract between such contained an arbitration clause. (R. 171.) During the performance of that contract, a dispute arose between Ondrick and Ferber over whether certain work was within or without the Ferber-Wilbraham contract. (R. 51, 53; R. 105.) In order to keep Ondrick performing the disputed work, Ferber made numerous threats to Ondrick. (R. 54; R. 151, 152.) Subsequently, Ferber called in Ondrick's bonding company (R. 54.) The bonding company conferred with Ondrick. (R. 54.) Thereafter, Ondrick completed the disputed work under protest (R. 55.)

Question Presented

Did a bill of interpleader which purported to concern only a final payment on a written contract, but which in fact contained allegations with respect to a disputed claim for work performed outside the scope of such written contract, and which also prayed for a discharge "*from all liabilities in the premises*" act as a waiver of an arbitration clause contained in the said written contract?

Reasons for Denying the Writ

The question is neither novel nor weighty. The petitioners mistakenly believe that the decision of the circuit court below has brought Federal Rule 22 into conflict with an arbitration clause contained in the joint-venture contract between Ferber and Wilbraham (See p. 6 of the petition). Obviously, such is not the case. The circuit court

below has ruled only that the allegation concerning Ondrick's individual claim, together with the prayer for a discharge from all liability contained in the petitioners' bill, acted as a waiver of the arbitration clause involved. The waiver is based on the intent of the petitioners' pleading and not on Federal Rule 22.

The Ferber Company v. *Theodore J. Ondrick*, 310 F.2d 462, and authorities cited.

Thus, the petition for a writ of certiorari is based on a misconception of the circuit court opinion below.

Conclusion

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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